IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0311

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CARL MELVIN ANKENY,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Third Judicial District Court,
Anaconda-Deer Lodge County, the Honorable Ray J. Dayton, Presiding

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STATEMENT OF THE ISSUES

1. Did the State present sufficient evidence that Ankeny and the alleged victim were "partners" to sustain Ankeny's conviction for felony partner family member assault?

2. In the absence of a proper foundation that Ankeny and the alleged victim were in a domestic relationship, did the trial court erroneously admit expert testimony that domestic violence victims commonly recant?

3. Did Ankeny receive effective assistance of counsel when his attorney failed to object to the introduction of hearsay statements of the alleged victim, to the introduction of 911 calls made by a third party, and to improper remarks made by the prosecutor in closing about her belief in the guilt of the accused? And if so, was Ankeny prejudiced by the errors of his counsel?

STATEMENT OF THE CASE

On October 15, 2008, Carl Melvin Ankeny (Ankeny) was charged with a felony offense of Partner Family Member Assault. (D.C. Doc. 4.) According to the Information filed in the case, it was alleged that on October 5, 2008, Ankeny had assaulted Shannon Carter (Carter), who was alleged to be his "partner." On November 18, 2008, the State filed notice that it would seek to treat Ankeny as a persistent felony offender. (D.C. Doc. 14.) On January 27, 2009, the State provided notice that it would present expert testimony on domestic violence issues

at trial. (D.C. Doc. 19.) Ankeny filed a motion in limine to exclude this testimony and a hearing took place on this motion on February 20, 2009. (D.C. Doc. 35; 2/20/09 Tr. at 2.) The jury trial in the case took place over two days. (2/23/09 - 2/24/09 Tr., hereinafter Tr.) Ankeny was convicted by the jury and sentenced by the district court to a term of twelve years at the Montana State Prison, with five years suspended. (D.C. Doc. 63.) Ankeny filed a timely notice of appeal and now files this opening brief.

STATEMENT OF THE FACTS

According to Carter, the alleged victim in this case, she and Ankeny went out on their "**first date**" the night of October 4, 2008. (Tr. at 69-70.) Carter testified that prior to October 4th, she was in a long term relationship with another man, Shane Nisbet (Nisbet). Nisbet and Carter lived together and had a child in common. Although they still lived together, Nisbet and Carter had agreed to separate the night before Carter and Ankeny went out on their first date. (Tr. at 101, 121.)

On the night of October 4th, Carter and Ankeny went out, and Nisbet stayed home to take care of the 2 ½ year old child he had in common with Carter, as well as her two other children (ages 8 and 9) from another relationship. (Tr. at 101, 113.) Nisbet agreed to stay home and take care of the children, provided Carter was home in time for him to leave for work early in the morning.

Carter testified she and Ankeny went out; they "had a few beers, kind of bar-hopped for a little bit, and went for a ride." (Tr. at 70.) Later, Carter admitted to having more than a "few beers." Carter testified she and Ankeny started drinking at six on the evening of the 4th and continued drinking until three or four the next morning. Carter admitted to being intoxicated and estimated that she had at least eighteen drinks over the course of the evening. (Tr. at 84.)

Ankeny and Carter went out in Carter's car, and Carter testified that she was the one driving. Carter candidly admitted she was "in no condition to drive." (Tr. at 84.) At one point, when driving back from Millcreek, Carter pulled over to "use the restroom." When she got back in the car, Ankeny told her that he did not want her driving any further. Carter testified that Ankeny took the keys out of the ignition. This upset Carter because she wanted to get home to her children. Carter testified she knew it was late and that Nisbet needed to go to work. (Tr. at 72.) Carter testified that while she and Ankeny argued about whether she could drive; nothing "physical" happened. Carter eventually left the car and started to walk home. (Tr. at 84.) Carter flatly denied that Ankeny had tried to choke her. (Tr. at 91.)

Ankeny testified on his own behalf at trial. Ankeny testified that he and Carter were driving back from Millcreek and that Carter's driving had scared him. (Tr. at 226.) When Carter pulled over the vehicle, Ankeny testified he made up his

mind if she kept driving; they were not going to make it home "once they hit the highway." Ankeny testified he was in no condition to drive, and that neither was Carter. Ankeny testified Carter kept telling him "she needed to get home, she needed to get home." (Tr. at 227.) Ankeny testified he tried to reason with her and told her they should "stop and sober up" before they tried to make it home. Ankeny testified he took the keys out of the ignition, and at some point, Carter left the car and started to walk home. Ankeny testified he did not attempt to follow her but stayed where he was, on the passenger side of the vehicle. Ankeny's statement was corroborated by law enforcement, who testified they located Ankeny passed out or asleep, in the passenger seat of the vehicle. (Tr. at 148, 164.)

After leaving the car, Carter called Nisbet on her cell phone. (Tr. at 72.) Nisbet had tried to call Carter prior to this time as she was late getting home, but Carter had not answered. (Tr. at 114.)

What exactly was said on the cell phone between Nisbet and Carter on the morning of October 5th was contested at trial. It was not contested that Nisbet and Carter had a tumultuous relationship. In addition to the fact that they had agreed to separate just the night before, the couple had been involved with the Department of Family Services approximately six months prior to October. The family's involvement with the Department of Family Services was due, in part, to allegations of domestic violence in the home between Nisbet and Carter. (Tr. at

85.) The children had been removed from Nisbet and Carter's care, and they had "just gotten them back." (Tr. at 118.) Both testified the other would threaten to bring allegations that the other parent was unfit. According to Carter, Nisbet made good on his threat in the past and had called the police on her several times and made false allegations. (Tr. at 88.)

When Carter called Nisbet, she asked him for a ride home. According to Carter, Nisbet told her that:

> he wasn't going to come out and get me but that he had to be to work in a few hours and I needed to make sure that I got home.
> . . .
> And then he told me that he was calling the police to get me a ride home and told me I wouldn't see my son again, he was taking my young son with him; (sounds like 'arrange') him somewhere to Butte when he went to work. And I asked him not to call the police; there was no reason for the police to be involved and I hung up on him.

(Tr. at 89.)

Carter testified that after she hung up on Nisbet, she started walking. (Tr. at 73.) She testified that as she was walking, she saw lights from the police, but hid from them in a ditch. Carter testified she hid from the police because she was concerned that she was going to go jail for something and that she was going to lose her kids. (Tr. at 73, 89.)

Nisbet's version of the phone calls that took place between he and Carter was different from Carter's version. Nisbet placed two 911 calls to the police that night and both of these tapes were played (without objection) for the jury. In the

tapes, Nisbet told law enforcement that he had received a phone call from his "wife" and that she was hysterical. As related by Nisbet to the 911 operator, Carter had called him and told him that Ankeny had "tried to kill her by choking her out" and that she had "jumped out of the car while it was moving." (Tr. at 196.) Tapes of the 911 calls that Nisbet had made were introduced into evidence as State's Exhibit A. (Tr. at 143.)

Nisbet provided more detail about his relationship with Carter at trial. Nisbet testified that he and Carter had been together for seven or eight years. They represented themselves to others as "husband and wife." (Tr. at 104.) Nisbet testified that he knew Ankeny because the two had worked together. In the summer of 2008, Ankeny had moved in with Nisbet and Carter. (Tr. at 105.) Towards the end of September, beginning of October, Nisbet had asked Ankeny to move out. Although he did not have any proof, Nisbet suspected "something was going on" between Carter and Ankeny. (Tr. at 106.) Nisbet described an incident where Carter had not come home as expected and he had gone looking for her. Nisbet said that he found Carter over at a friend's house, and Ankeny was there as well. As described by Nisbet:

> I had a gut feeling. Like I said, I could not prove it at that point, but ya, the question was raised.

(Tr. at 108.)

Nisbet testified that if Carter was not at home when it was time for him to leave for work in the morning, it would "cause problems." He would have to find somebody to come and take care of the kids and make sure they got to school and daycare, or he would have to do it himself, and miss work. (Tr. at 107.) Nisbet testified that he and Carter had made an agreement to separate "the evening before the last time she disappeared, if that makes sense." (Tr. at 111.) When asked to clarify what day he meant, Nisbet was asked if it was the same evening Carter went out with Ankeny and he replied:

> It was late at night when we had made the agreement. The next day went by; and then she went out, yes.

(Tr. at 111.)

On October 4th, Nisbet knew Carter had plans to go out with Ankeny. The agreement Nisbet made with Carter, was that he would watch the kids if she would be back before twelve or one o'clock. Nisbet testified that he woke up at 3:30 or 4:30 a.m. and Carter was not home. When he discovered that Carter was not home, he tried to call her and text her, but she did not immediately answer. Nisbet admitted he was angry that Carter was not there when he woke up. (Tr. at 119.)

Carter returned Nisbet's call fifteen to twenty minutes later. According to Nisbet, when Carter called him back, she was in hysterics. Nisbet said that he could hardly understand what she was saying at first. (Tr. at 114.) According to Nisbet:

> I asked her to calm down so that I could understand her, and that took a few minutes. And I asked her what was going on.

(Tr. at 115.)

According to Nisbet, Carter told him that she had tried to jump out of the car because [Ankeny] had tried to kill her and she was hiding in the ditch. (Tr. at 115.) Carter said she wanted Nisbet to come pick her up.

According to Nisbet:

> We had talked back and forth because we kept losing the connection, or whether it was a loss of connection or hang up, or whatever, she said that Mr. Ankeny was driving up and down the road looking for her, and that she was hiding in the ditch.

(Tr. at 115.)

Nisbet said that Carter wanted him to come get her. He testified he did not want to do that because the kids were in bed, sleeping. According to Nisbet:

> it was cold outside; that I didn't think that was a good idea, to load the kids up and come and get her. You know, come out there in that weather.

(Tr. at 117.)

Carter suggested that he come get her and just leave the kids sleeping. Nisbet testified he did not want to do that, because they had just "got the kids back" and he did not want the kids "taken away again, by chance." (Tr. at 117.) Nisbet told Carter he would "figure something out." Nisbet called 911 to report that Carter had been assaulted by Ankeny.

During cross-examination, it was established that Nisbet was on probation on October 4, 2008. (Tr. at 123.) It was also established that Carter had filed for a temporary restraining order against Nisbet three weeks *after* October 4th. (Tr. at 122.) The prosecutor clarified that the restraining order against Nisbet had been dismissed at the time of Ankeny's trial because Carter had not appeared at the hearing scheduled to extend the order. (Tr. at 139.)

At the trial, it was disputed whether Carter had injuries that would be consistent with being choked. (The State apparently conceded that Carter did not have injuries consistent with her jumping out of a moving car.) At trial, Carter testified that she did not have any injuries, but did have "hickies" on her neck.

The State presented testimony from Carter's father at trial. (Tr. at 182.) Carter's father had been called by a friend when the friend heard Carter's name over a police scanner. The friend told Carter's father he had heard someone had tried to kill Carter. (Tr. at 183.) Carter's father drove to the location where the police had located Carter. Carter's father told officers he would talk to Carter as he could see Carter would not talk to them and kept backing away. (Tr. at 185.) According to Carter's father, Carter was distraught, she was crying. It looked like she had been drinking and she was "kind of hysterical." According to Carter's father, Carter was "afraid she was going to lose her kids." (Tr. at 185.)

Carter did eventually talk to the officers. When asked about the conversation he overheard Carter have with the officers, Carter's father testified that he did not remember it all, but that he remembered them asking Carter several times if she had been choked by Ankeny and she had told them no. He testified that at one point, Carter must have told them yes, because he remembered putting that in a statement he filled out for law enforcement the next day. (Tr. at 186.) Carter's father testified he did not notice any injuries to Carter, but agreed that after the officer pointed them out, he did see red marks on her neck, including a hickey. He also testified that his daughter flushed "easily, very easily." (Tr. at 190.) Finally, Carter's father testified he believes his daughter when she says Ankeny "did not do this." (Tr. at 191.)

The State introduced photographs taken of Carter on October 5, 2008. (State's Exhibit B – D, Tr. at 157.) According to the officer who took the photographs, red marks observed in the photos on Carter's neck were "consistent with being choked." (Tr. at 157.) Carter testified that the red marks on her neck were "hickies." (Tr. at 80.) Carter also testified that she flushes and turns red easily, and when she is nervous, she rubs her neck. (Tr. at 92.)

On October 6, 2008, Carter wrote two letters: one to the judge, and one to the prosecuting attorney. In the letters, Carter referred to Ankeny as her "boyfriend" and asked that the charges against him be dropped. Carter said he was

innocent. (Tr. at 80, 94; *see also*, Defense Exhibits A and B.) At trial, Carter testified Ankeny was not her boyfriend on October 5th. Carter explained:

> We had just started dating then. I don't know if I would consider him a boyfriend. We had just started dating. It was our first date.

(Tr. at 69.)

When Ankeny testified, he confirmed that October 4, 2008 was the first time that he and Carter had gone out on a date. (Tr. at 224-25.)

Expert testimony

The State filed notice that they were going to offer the testimony of Social Worker Thompson at trial to testify as to issues of domestic violence and the fact that domestic violence victims frequently recant. (Tr. at 6.) Ankeny filed a motion in limine to exclude this testimony. Following a hearing, the district court allowed Thompson to testify. (Tr. at 206.)

At trial, Thompson testified that it was not unusual for domestic violence victims to recant. (Tr. at 209.) Thompson said that domestic violence victims do so out of love, hope and fear. Although Thompson was not asked to relate his testimony to the facts in the case, the prosecutor did so in her closing:

> Thompson told you, the purpose of his testimony was to help you understand why victims of domestic violence; it's common that victims recant. And that what we had in this statement. . . . We have a recant.
>
> . . .

> She recanted and it's common for victims of domestic violence; which she is by her own admission, common to recant.

(Tr. at 255.)

SUMMARY OF ARGUMENT

The State failed to present sufficient evidence that Ankeny and Carter were "partners" on the night of the alleged assault for Ankeny's conviction for felony partner family member assault to stand. Going out on a "first date" does not make a person a "partner." The purpose of the Montana's partner family member assault statute is to provide enhanced protections for a specific class of victims by providing for enhanced penalties and other remedies for violations. Such victim-specific crimes must be narrowly interpreted if they are to achieve their intended purpose. Expanding the limits of the statute to include members not intended to be protected by the statute does a disservice to those the statute is designed to protect.

In view of the fact that Ankeny and Carter were not in a domestic relationship, the State's expert testimony about the tendency of domestic violence victims to recant was inflammatory, prejudicial and irrelevant.

Ankeny's trial counsel was ineffective in failing to object to the admission of hearsay statements allegedly made by the victim to her former boy-friend/common-law spouse. Counsel was ineffective in failing to object to the admission of tapes of 911 calls made by the ex-boyfriend/common law spouse to law enforcement. Counsel was also ineffective in failing to object to the

prosecutor's numerous references to her belief in the guilt of the accused. Trial counsel's errors were not reasonable trial strategy and without the errors, it was unlikely the result against Ankeny would have been the same.

ARGUMENT

I. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE ANKENY AND CARTER WERE "PARTNERS" TO SUSTAIN ANKENY'S CONVICTION FOR THE OFFENSE OF PARTNER FAMILY MEMBER ASSAULT.

A. Standard of Review and Reviewability

Even in the absence of a motion challenging the sufficiency of the evidence in the district court, this Court has the power to provide a comprehensive review of the proceedings for sufficiency of the evidence. *See State v. Granby*, 283 Mont. 193, 198-99, 939 P.2d 1006, 1009 (1997). This Court reviews the sufficiency of the evidence to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Richards*, 274 Mont. 180, 184, 906 P.2d 222, 224 (1995).

B. Discussion

Due process requires the State to prove all of the elements of a charged criminal offense. *State v. Nolan*, 2003 MT 55, ¶ 9, 314 Mont. 371, 66 P.3d 269; *citing to Sullivan v. Louisiana*, 508 U.S. 275, 277- 78 (1993). The prosecution must prove all of the elements, and must persuade the factfinder "beyond a

reasonable doubt" of all of the facts necessary to establish each of those elements, *see e.g.*, *In re Winship*, 397 U.S. 358, 364 (1979).

Ankeny was specifically charged with a felony violation of Mont. Code Ann. § 45-5-206(1)(a). Under subpart (a), a person commits the offense of partner or family member assault if the person "purposely or knowingly causes bodily injury to a partner or family member." A third or subsequent conviction involving a partner or family member is a felony.

A "family member" is defined under the statute to include mothers, fathers, children, brothers, sisters, and other "past or present" family members of a household. **"Partners," on the other hand, are defined under the statute as: "spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex."** Mont. Code Ann. § 45-5-206(2)(b), emphasis added.

As a matter of law, Ankeny challenges the sufficiency of the evidence admitted at his trial on the issue of whether he and Carter were "partners" within the meaning of Mont. Code Ann. § 45-5-206(2)(b).

The amount and type of evidence necessary to establish a "dating or ongoing intimate relationship" sufficient for a conviction under Montana's partner family member assault statute appears to be an issue of first impression in a reported

decision of this Court. This same issue has been raised and addressed by numerous other state courts with domestic violence statutes that are worded similarly to Montana's own statute. *See e.g.*, *Alison C. v. Westcott*, 798 N.E.2d 813 (Ill. App. Ct. 2003) (evidence that the parties had attended the same high school, had spoken on the telephone, and had a single lunch date was not sufficient to establish a "dating relationship"). *See also*, *Andrews v. Rutherford*, 832 A.2d 379 (Ch. Div. 2003) (evidence that parties considered each other to be boyfriend and girlfriend, went out several times over several months, had an affectionate and sexual relationship, and had met with one set of parents was sufficient to establish a "dating relationship").

In the case of *Oriola v. Thaler*, 84 Cal. App. 4th 397 (2000), the California court of appeals defined a "dating relationship" as:

> a serious courtship . . . a social relationship between two individuals who have or have had a reciprocally amorous and increasingly exclusive interest in one another, and shared expectation of the growth of that mutual interest, that has endured for such a length of time and stimulated such frequent interactions that the relationship cannot be deemed to have been casual.

Oriola, 84 Cal. App. 4th at 412. The court came to this definition after an analysis of the precedent from other jurisdictions and a lengthy historical analysis of the meaning of the term "dating." *Oriola*, 84 Cal. App. 4th at 407, 411.

When construing statutes, courts are to look to the intention of the Legislature as determined from the plain meaning of the words used within the

statute. *See State v. Trull*, 2006 MT 119, 332 Mont. 233, 136 P.3d 551; *see also*, Mont. Code Ann. § 1-2-102. The Legislature need not define every term it employs when constructing a statute. If a term is one of "common usage" and is readily understood, it is presumed that a reasonable person of average intelligence can comprehend it. *Trull*, ¶ 33.

The problem, or "conundrum" as identified by the New Jersey Superior Court in the case of *Andrews*, lies in the fact that the words "dating relationship" provoke a different "common usage" from one person to the next. *Andrews*, 832 A.2d at 382. Any attempt to discern a universal meaning for this phrase is "problematic." As noted by the court:

> The legislature specifically intended the protected individuals to be in a relationship or more clearly, a "dating relationship." Not to have included the term relationship could very well lead to the circumstance where two people meet for a lunch date or date at the movies only on one occasion. In the event one of the parties thereafter committed one of the underlying offenses set forth in the statute, a court might be required to find that the domestic violence statute applies to a situation where two individuals have a onetime casual lunch or 'dinner date'.

Andrews, 832 A.2d at 382.

Many states incorporate factors into their statutes to aid courts in determining whether a "dating relationship" actually exists. For example, in Massachusetts, the relevant statute lists several factors, including the length of time of the relationship, the type of the relationship, and the frequency of interaction

between the parties. *See* Mass. Gen. Laws Ann., 209A, § 1 (2010). In Washington, factors contained within that state's statute also include the length of time the relationship has existed, the nature of the relationship, and the frequency of the interaction between the parties. *See* Wash. Rev. Code Ann. § 26.50.010(3) (2010). Vermont contains a somewhat more comprehensive list of factors, and includes the nature of the relationship, the length of time the relationship has existed, the frequency of interaction between the parties, and the length of time since the relationship was terminated, if applicable. *See* Vt. Stat. Ann. Tit. 15, § 1101(2) (2009). As is clear by a review of these statutes, a variety of states use very similar factors when determining the existence of a dating relationship.

Montana's statute defines "partners" as "spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex." The definition of "partners" does not include a list of factors to aid the court when determining the existence of a "dating or ongoing intimate relationship" but these terms should be construed to embody a relationship similar to the others listed in this same section: including "spouses," "former spouses" and "persons who have a child in common." When construing a statute, the context within which the phrase is used must be considered. *See* Mont. Code Ann. § 1-2-106; *In re Takahashi's Estate*, 113 Mont. 490, 491, 129 P.2d 217, 218 (1942). If the Montana Legislature

had meant to include within the class of relationships protected by the partner family member assault statute persons who had gone out on their first date, then the Legislature could have done so. Instead, the Legislature used the word "partners" and within the definition of "partners" included "persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex." The length of time of the relationship, the type and nature of the relationship, the frequency of the interaction of the parties exclude persons who have gone on their "first date."

In the present case, even after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found that Ankeny and Carter were "partners" within the meaning of Montana's PFMA statute. The undisputed evidence presented at trial was that Carter and Ankeny had gone out on their "first date" on October 4, 2008. Prior to that time, it was undisputed that Carter was in an ongoing intimate relationship with another man. Nisbet may have had a "gut feeling" that something more was going on between Carter and Ankeny; but Nisbet's gut feeling does not rise to the level of evidence sufficient to sustain a conviction.

Carter and Ankeny were not "partners." If anything, it was Carter and Nisbet who were "partners." In fact, from the testimony presented, it appears they are more than "partners" and may be common-law spouses. There was no question

that Carter continued to live in the same house with Nisbet on and after October 4th. The point being, *Carter and Nisbet's* relationship fell within the terms of the statute, *Carter and Ankeny's* first date, did not.

Although finding no case with the exact same fact pattern, the facts in the present case are similar to those in *Brand v. State*, 960 So. 2d 748 (Ala. 2006). In *Brand*, the Alabama Court of Criminal Appeals found evidence insufficient to sustain the defendant's conviction under that state's domestic violence statute. In *Brand*, the testimony at trial was that the defendant and the victim had been intimate and interacted socially over a two year period. The dissent found that this evidence, in addition to the defendant's jealousy, supported the trial court's conclusion that the parties were in a "dating relationship." The majority for the appellate court disagreed, and the majority's explanation of its decision in the case is illuminating:

> Contrary to the dissent's assertions, the record does not support the inference that the trial court concluded that the appellant and the victim were in a dating relationship based on their social interactions over a two-year period and the appellant's jealousy. Rather, as we have previously noted, it appears from the trial court's comments at the end of the proceeding that it found the appellant guilty of third-degree domestic violence based on harassment simply because he and the victim had sexual relations the night they met. The purpose of the domestic violence statutes is to protect a specific class of victim by providing enhanced penalties. Such victim-specific crimes must be narrowly interpreted if we are to reflect their intended purpose. We cannot include in the specific category of "dating relationship" all sexual encounters no matter how infrequent or remote. To do so

> would be a disservice to the victims intended to benefit from the domestic violence statutes.

Brand, 960 So. 2d at 754. The appellate court found that the evidence was insufficient, as a matter of law to establish a dating relationship, and reversed Brand's conviction.

In the present case, as was the case in *Brand*, the purpose of Montana's domestic violence statutes is to protect a specific class of victims by providing for enhanced penalties to those convicted of violating its terms. At the same time, victim-specific crimes must be narrowly interpreted if the statutes are to reflect their intended purpose. Furthermore, this Court is compelled to follow the classic rule of construction of criminal statutes which was quoted with approval in this Court's decision in *State v. Van Robinson*, 248 Mont. 528, 813 P.2d 967 (1991):

> Penal statutes are construed with such strictness as to safeguard the rights of the defendant. If the statute contains patent ambiguity and admits of two reasonable and contradictory constructions, that which operates in favor of a party accused under its provisions is to be preferred. **Moreover, penal statutes are not to be extended in their operation to persons, things, or acts not within their descriptive terms, or the fair and clear import of the language used.** Nothing can be read into penal statutes by implication.

Van Robinson, 248 Mont. at 534, 813 P.2d. at 971 (emphasis added). In the present case, the State read the word "boyfriend" into the partner family member statute. In doing so, the State failed to present sufficient evidence that Ankeny and Carter were "currently in a dating or ongoing intimate relationship" (*at least, with*

each other). Extending Montana's PFMA statute to those who go out on a first date does a disservice to those who are truly deserving of the statute's protection. Strict construction of the statute prevents Ankeny from being convicted of PFMA under the facts of this case. Viewed in the light most favorable to the State, the State failed to present sufficient evidence that Ankeny and Carter were partners and his felony conviction for PFMA must be reversed.

II. THE DISTRICT COURT ERRED IN ADMITTING EXPERT TESTIMONY ON DOMESTIC VIOLENCE.

In the event that this Court does not reverse Ankeny's conviction due to the lack of evidence that he and Carter were "partners," Ankeny asks this Court to reverse his conviction due to the district court's erroneous admission of expert testimony.

A. Standard of Review

Rulings on the admissibility of evidence are left to the sound discretion of the trial court. *State v. Stringer*, 271 Mont. 367, 374, 897 P.2d 1063, 1067 (1995). This Court reviews a district court's evidentiary rulings to determine whether the court abused its discretion.

B. Discussion

1. The Expert Testimony Was Erroneously Admitted to Bolster the Credibility of Carter.

In *State v. Dannels*, 226 Mont. 80, 86, 734 P.2d 188, 192 (1987), this Court made it very clear that testimony the accused suffered from the effects of the battered woman syndrome would not be admissible as an explanation for why the accused had lied to the investigating officers. The Court said it was inappropriate for the accused to attempt to bolster her credibility through the use of expert testimony.

In the present case, the State sought to use expert testimony to achieve the same goal as in *Dannels*: enhancement of the credibility of the purported original statements of Carter. The State wanted to present expert testimony for the purpose of explaining why domestic violence victims recant. As such, the purpose for its admission is indistinguishable from that in *Dannels*, and the expert testimony should have been prohibited here.

2. The Expert Testimony Was Erroneously Admitted in the Absence of a Proper Foundation.

This Court discussed the foundation necessary for the admission of expert testimony of the battered woman syndrome in *Stringer*, 271 Mont. at 378, 897 P.2d at 1070. In *Stringer*, while setting no "hard and fast foundational requirements" this Court indicated that the party seeking to introduce battered woman syndrome

evidence must "lay an appropriate foundation substantiating that the conduct and behavior of the witness is consistent with the generally recognized symptoms of the battered woman syndrome," and that "the witness has behaved in such a manner that the jury would be aided by expert testimony which provides a possible explanation for the behavior."

In the present case, Ankeny asserts that both foundational prongs from *Stringer* are missing. First, Thompson did not testify that Carter's "conduct and behavior were consistent with the generally recognized symptoms of the battered woman syndrome." In fact, a more careful application of Thompson's expert testimony to Carter's actions will demonstrate she acted "inconsistently" from domestic violence victims, not "consistently." Thompson testified that initially, domestic violence victims are cooperative with law enforcement because they want to be protected. It is only afterwards that they may have second thoughts and want to recant. (Tr. at 209.) In the present case, the evidence was clear Carter was "uncooperative" with law enforcement from the start, and that she actually hid from them when they were trying to find her.

Nor did the State present an adequate foundation that Carter "behaved in such a manner that the jury would be aided by an expert on domestic violence to explain her behavior." If an expert was truly necessary in this case, the jury would

have been better served by an expert who could have testified as to the effects of eighteen alcoholic drinks on a person's behavior.

Under the facts of this case, Thompson's testimony (not only) was not helpful: it was not relevant. Thompson was not asked to relate his opinion to Carter or to the facts of this case. Because the only incident of domestic violence that was alleged between Ankeny and Carter was the underlying charge, the jury would have had to assume the truth of the charge to have been aided in any way by Thompson's testimony.

At the same time, Thompson's testimony was extremely prejudicial. During closing, the State argued the very inference it had not asked Thompson to make:

> Thompson told you, the purpose of his testimony was to help you understand why victims of domestic violence; it's common that victims recant. And that what we had in this statement. . . . We have a recant.
> . . .
> She recanted and it's common for victims of domestic violence; which she is by her own admission, common to recant.

(Tr. at 255.)

Thompson's testimony about the tendency of domestic violence victims to recant was used to bolster the one statement of Carter the State apparently found to be credible. The district court abused its discretion in admitting the expert testimony in this case and the admission of this testimony was reversible error.

III. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE ADMISSION OF HEARSAY EVIDENCE AND THE IMPROPER ARGUMENT OF THE PROSCUTOR AND ANKENY WAS PREJUDICED BY THIS FAILURE.

A. Standard of Review

Ineffective assistance of counsel claims constitute mixed questions of law and fact which this Court reviews de novo. *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861. In considering ineffective assistance of counsel claims on direct appeal, this Court applies the two-pronged standard of review set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984); *see Hagen v. State*, 1999 MT 8, ¶ 10, 293 Mont. 60, 973 P.2d 233. Under the *Strickland* test, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Hagen*, ¶ 10.

Under the first prong of *Strickland*, the question which must be answered is whether counsel's conduct fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances. *Whitlow*, ¶ 20. The second prong of *Strickland* requires the Court to assess whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Importantly, prejudice may result from a single error or from the cumulative impact of multiple deficiencies. *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978).

Where ineffective assistance of counsel claims are based on facts of record in the underlying case, they must be raised in the direct appeal; conversely, where the allegations of ineffective assistance of counsel cannot be documented from the record in the underlying case, those claims must be raised by petition for postconviction relief. *Hagen*, ¶ 12, *see also*, Mont. Code Ann. § 46-21-105(2). Generally, a failure to object to the introduction of evidence, testimony of a witness or to prosecutorial misconduct at trial has been deemed record-based, and appropriate for direct appeal. See *Hagen*, ¶ 19.

B. Discussion

The trial transcript in this case is replete with numerous instances where hearsay testimony was admitted without objection by the attorney for the defendant. Originally, at the hearing on the defense motion in limine to exclude expert testimony, defense counsel informed the district court of his intent to call the alleged victim to testify *if the State did not*. The district court seemed (justifiably) confused by this statement, and asked for clarification from the State:

THE COURT: Does the State intend to call her in the case in chief?

[PROSECUTOR]: No.

THE COURT: You sure?

[PROSECUTOR]: Yes.

> THE COURT: What if you don't call her and he don't call her? Anyway . . . .

(2/20/09 Tr. at 3.)

Later, Ankeny's trial counsel again reiterated his intent to call the alleged victim, if the State did not. The trial court tried to alert defense counsel to his mistake, but was not successful:

> [DEFENSE COUNSEL]: And that's true, Your Honor, if the State doesn't call her we would be calling her.
>
> THE COURT: Alright, well . . .
>
> [PROSECUTOR]: Well as I said, I . . . .
>
> THE COURT: I don't know if we can commit you to that or not, but . . . .
>
> [PROSECUTOR]: Well, I believe we're, we're . . . .
>
> THE COURT: It's one of those things that trial lawyers wake up in the middle of the night and think about I think.

(2/20/09 Tr. at 14.)

Carter did testify in this case, and her prior statements were admitted without objection at trial. Ankeny now raises as error the admission of the numerous out-of-court statements allegedly made by Carter at his trial and his counsel's failure to object to the admission of these statements.

1. Trial Counsel Was Ineffective for Failing to Object to the Hearsay Statements Made by Carter to Nisbet.

At trial, the State presented testimony of an out-of-court statement made by Carter to Nisbet that Ankeny had tried to kill her by choking her out. (Tr. at 61, 115-17.) This statement was then repeated numerous times, to the point that it gained credibility, just by repetition. Because the defense did not object to the introduction of this statement, the basis for its admission is unclear.

If the basis for the admission of the statement was that it was an excited utterance, the State defeated the foundation for the admission of this statement in its opening statement. During its opening, the State admitted that the statement made by Carter to Nisbet was in response to his prompting and questioning:

> It took a bit, but he was able to get out of her that she had been out with the Defendant, Carl Ankeny, who she refers to as her boyfriend.

(Tr. at 61.) *See also*, the testimony of Nisbet:

> It had gotten to the point where we could calm her down enough to where I could understand what she was saying. And when I didn't, I would ask her again.

(Tr. at 120.)

Statements admitted under the excited utterance exception cannot be in response to questioning or prompting. As noted by this Court in *Hamby*:

> [t]he guarantee of trustworthiness [of an excited utterance] is provided by the spontaneity of the statement, caused by the excitement . . .

> which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.

State v. Hamby, 1999 MT 319, ¶ 26, 297 Mont. 274, 992 P.2d 1266 (internal quotation marks and citations omitted). If there is time for reflection, there is time for fabrication. The State's own characterization of these statements defeats the foundational requirement for admissibility of this statement as an excited utterance.

2. Trial Counsel Was Ineffective for Failing to Object to the Admission of the 911 Tapes.

The error in the admission of the statement allegedly made by Carter to Nisbet was severely compounded, because this statement was repeated as hearsay within hearsay when the 911 tapes were played for the jury. During the 911 tapes played for the jury, Nisbet is heard allegedly repeating the statement made by Carter to him. Again, there was no defense objection to the admission of these tapes.

The admission of the 911 tapes into evidence was prejudicial error on several levels. First, the statements contained in the 911 tapes were not of Carter calling and requesting assistance--they were of Nisbet calling to report that Carter had called him and requested help. The tapes not only reflected the hearsay statements of Nisbet to the 911 operator, they included the hearsay statements allegedly made by Carter to Nisbet.

The State acknowledged the hearsay in hearsay nature of the statements made in the 911 calls and all subsequent statements during its closing:

> We have a frantic person calling somebody at; Shane Nisbet at 5:00 o'clock in the morning, who in turn calls dispatch, who in turn writes notes independently, but in turn, at the time notifies officers.

(Tr. at 249.)

Even if the jurors could consider the 911 tape in evaluating Nisbet's credibility, they could not treat Nisbet's prior statement (or more accurately, Nisbet's prior statement allegedly repeating Carter's prior statement) as proof that Ankeny assaulted Carter. Hence, it was objectionable for the State to suggest during closing arguments that the 911 call, and Nisbet's statements made during the 911 call, were by themselves, evidence that Ankeny had assaulted Carter, which is precisely what the State did:

> Well how do we know it did happen? How do we know that Carl Ankeny choked Shannon Carter on the morning of October 5th, early in the morning, causing her to jump out of the car, be distraught, scared, feel like she needs to hid (sic) and make a cry for help to Shane Nisbet; how do we know that?
>
> We know that first because, that he choked her, we know that first because she said so. That was the first thing she said when she came out and she called Shane Nisbet for help. She said, 'he tried to kill me and he choked me out'. **Those were at least the two where we can listen on the 911 tapes**, and **I invite you to listen to those tapes again; you will hear that.**

(Tr. at 248, emphasis added.)

> Shannon Carter alleged that Carl Ankeny choked her, assaulted her by trying to choke her. She was so scared she jumped out of the car and she was hiding. **If you listen to, if you listen to the tape, it's the second call. You will hear Shane Nisbet say twice, he tried to choke her out.**

(Tr. at 249, emphasis added.)

The 911 tapes should not have been admitted for the jury to hear, let alone referenced by the prosecutor as substantive evidence that the crime had happened.

3. Trial Counsel Was Ineffective for Failing to Object to Improper Remarks by the Prosecutor During Closing.

The prosecutor committed additional misconduct during closing arguments that was not objected to by Ankeny's trial counsel:

> In this case the State is trying to say 'no to domestic violence.' Nip it in the bud, if you will. In this case, where the proof is, **the State believes beyond a reasonable doubt** that Carl Ankeny assaulted Shannon Carter by choking her.

(Tr. at 246, emphasis added.)

> **The State believes** it has met its burden of proof to show you beyond a reasonable doubt that Carl Ankeny and Shannon Carter were partners within the meaning of the statute.

(Tr. at 246, emphasis added.)

> Finally, the State made the following additional improper comments:
>
> Now remember why we're here, again, we're here because **the State believes** and has alleged that Carl Ankeny choked Shannon Carter . . . .

(Tr. at 247, emphasis added.)

4. Ankeny Was Prejudiced by His Counsel's Performance.

The second prong of an ineffective assistance of counsel claim requires this Court to determine whether the defendant was prejudiced by counsel's deficient performance. In order for a defendant to show that he was prejudiced, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Yecovenko v. State*, 2007 MT 338, ¶ 16, 340 Mont. 251, 173 P.3d 684. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Hammer v. State*, 2008 MT 342, ¶ 15, 346 Mont. 279, 194 P.3d 699. A reasonable probability is a lower standard of proof than a preponderance of the evidence. *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1243 (9th Cir. 2005).

In cases where "there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996). In other words, "'[e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.'" *Thomas v. Hubbard*, 273 F.3d 1164, 1180 (9th Cir. 2001).

In the present case, Ankeny has satisfied the second prong of the Strickland test. He has shown that the errors of counsel, alone or cumulatively, resulted in a trial that was fundamentally unfair and are sufficient to undermine confidence in the verdict.

By failing to object to the numerous out-of-court hearsay statements of Carter, Ankeny allowed the State to draw repeated attention to a statement that was not subject to cross-examination when made and was otherwise lacking in any indicia of reliability. This error was compounded, when the defense failed to object to the introduction of the 911 tapes into evidence.

Ankeny's trial counsel failed to object to the prosecutor's repeated references to her "belief" in the guilt of Ankeny. The numerous reasons why prosecutors are not allowed to express their personal belief in the guilt of the accused are set forth in length in this Court's decision in *State v. Campbell*, 241 Mont. 323, 328-29, 787 P.2d 329, 332-33 (1990). Among the reasons are: (1) a prosecutor's expression of guilt invades the province of the jury and is an usurpation of its function to declare the guilt or innocence of an accused; (2) the jury may simply adopt the prosecutor's views instead of exercising their own independent judgment as to the conclusions to be drawn from the testimony; and (3) the prosecutor's personal views inject into the case irrelevant and inadmissible matters or a fact not legally proved by the evidence, and add to the probative force

of the testimony adduced at the trial the weight of the prosecutors' personal, professional, or official influence.

In *State v. Lindberg*, 2008 MT 389, 347 Mont. 76, 196 P.3d 1252, this Court found that trial counsel's failure to object to the prosecutor's closing arguments fell below an objective standard of reasonableness under prevailing professional norms in light of the circumstances of the case. As noted by this Court in the *Lindberg* case: "We simply cannot conceive of any rationale under which defense counsel would sit on his hands and fail to object to such comments." *Lindberg*, ¶ 47. Like in *Lindberg*, there is no conceivable rationale for Ankeny's counsel to have failed to object to these comments in this case.

Upon review of the record, it is clear that counsel's errors in the present case resulted in prejudice, the absence of which could have reasonably have resulted in a different outcome.

CONCLUSION

For the reasons as set forth herein, Ankeny asks that this Court reverse his conviction for felony partner family member assault. The State failed to present sufficient evidence that he and Carter were "partners" to sustain his conviction for partner family member assault. Ankeny did not receive a fair trial, and his conviction cannot stand.

Respectfully submitted this ____ day of March, 2010.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

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APPENDIX